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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 21

MORTIMER NORMAN KORAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

H. ROBERT KOLTNOW &
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1201 Biscayne Building
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MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1968

No. _____

MORTIMER NORMAN KORAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, affirming Petitioner's conviction, has not yet been reported, but may be found in Appendix G.

GROUNDS FOR JURISDICTION

The Sentence and Judgment of conviction of the United States District Court for the Southern District of Florida was entered on October 27, 1967. (Appendix E) The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 27, 1969. (Appendix H). The Order Denying Petition For Rehearing was entered on March 28, 1969 (Appendix I), at which time the decision became final.

Justice HUGO L. BLACK extended the time for Filing Petition For Writ of Certiorari to and including May 27, 1969. (Appendix J).

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the United States Court of Appeals for the Fifth Circuit. The Jurisdiction of this Court is further invoked under 28 U.S.C. 1254 (1), in view of the conflict between the decision of the Fifth Circuit herein and that of the Seventh Circuit in **United States vs. White,** 405 F. 2nd 838 (7th Cir. 1969).

QUESTION PRESENTED

Though the electronic surveillance of petitioner occurred prior to the decision in Katz vs. United States on December 18, 1967, does the introduction into evidence of tape recordings of oral and telephone conversations of petitioner, when petitioner elects not to testify at his trial, constitute a violation of his rights under both the fourth and fifth amendments.

CONSTITUTIONAL STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 28 UNITED STATES CODE

SECTION 1254 (1)

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after the rendition of Judgment or Decree.

TITLE 28 UNITED STATES CODE

SECTION 1257 (3)

Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES

RULE NO. 19 (1) (b)

Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable

state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

In June, 1966, Petitioner was a printer engaged in business in Hallandale, Broward County, Florida. The City of Miami Police and the Florida Highway Patrol were conducting an investigation of counterfeit Florida drivers' licenses, and during such investigation the two departments cooperated with the United States Secret Service, who were investigating counterfeit currency. (R. 59, 98) Pursuant to their combined plans, an informer was equipped with an electronic device on his person, and he was sent to Petitioner's place of business to discuss counterfeiting. Their conversation was overheard and recorded by government agents who stationed themselves nearby, but outside the premises. (R. 26-28).

The next day, the informer telephoned Petitioner at his place of business, but the informer's telephone was equipped with an electronic eavesdropping device, and the conversation was likewise overheard and recorded by other agents (R. 68-82). During the next few days, the undercover agent initiated several telephone calls to Petitioner, and these telephone conversations were also overheard and recorded. (R. 87-89)

The Defendant was later charged on a Six Count Indictment for violation of Title 18, U. S. Code, Section 474. (Appendix A). Prior to trial, Petitioner's Motion to Suppress raised the constitutional question (Appendix B). The Motion was primarily directed toward (1) the oral conversation between the informer and Defendant in Petitioner's place of business, (2) the oral conversations between the government agent, the informer and Petitioner, not at Petitioner's place of business, and (3) the telephone conversations between the informer and the government agent, on the one hand, and Petitioner, which calls were made to, not from, Petitioner at his place of business. The Trial Court denied Petitioner's Motion to Suppress as to all conversations (R. 24-38).

At the trial, the Government introduced testimony of the government agents as to all of the above oral and telephone conversations of Petitioner, which they overheard, and in addition, the Government introduced into evidence tape recordings of same and played them to the jury (R. 157-215) over Petitioner's objections (R. 125-139) and Motion for Mistrial (R. 125-139, 215).

Neither Petitioner or the informer testified at the Hearing on the Motion To Suppress or at the Trial.

Petitioner was found guilty of two counts, making a print of a one dollar Silver Certificate, and being in possession of same, and was sentenced to a term for five years on each Count, the sentences to run concurrently. (Appendix E)

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, (Appendix F) and again

raised the constitutional questions in his Brief. The conviction was affirmed, (Appendix G), and the Petition For Rehearing, which was denied on March 27, 1969, (Appendix I) also raised the constitutional questions.

REASONS FOR GRANTING THE WRIT

A. Fifth Amendment Rights

There is now no question that the government's electronic eavesdropping activities in the instant case were clearly violative of Petitioner's Fourth Amendment rights. In prior arguments to the lower Courts, Petitioner has relied heavily upon **Katz vs. United States** 389 U. S. 347, 88 S.Ct. 507 (1967), but if it were not for this Court's prospective application of the **Katz** rule in **Desist vs. United States,** ____ U. S. ____ (March 24, 1969), Petitioner's conviction herein would undoubtedly be reversed. This Court's statement that "**Katz** is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967," has now made it futile to argue here what has been foreclosed.

There are, however, major factual differences between the present case and **Desist,** which, Petitioner urges, distinguish this case from the harsh and unjust results of **Desist,** and bring into focus the Fifth Amendment question. **Desist** was not clear as to whether the Defendants therein did or did not testify in their own behalf, other than this Court's pronouncement "an important part of the Government's evidence consisted of tape recordings of conversations among several of the Petitioners in a New York City hotel room." The lower Court, however,

indicated that several of the Defendants offered affirmative testimony and evidence, including an alibi, which may well have included direct testimony by the Defendants.

It is Petitioner's contention that the Fifth Amendment demands a Defendant should "not be compelled in any criminal case to be a witness against himself." To give full meaning to the rights created under such Amendment, the illegally seized tape recordings of oral and telephone conversations of Petitioner, which contained many incriminating statements by Petitioner, should not have been introduced into evidence and played to the jury, until and unless Petitioner elected to testify at the trial. In the event Petitioner waived his rights and did elect to testify, the tape recordings could then be introduced into evidence to impeach the testimony of Petitioner.

If the above were not the rule, then Courts are merely giving lip service to a defendant's Fifth Amendment rights, in that the practical effect, as was the case here, would be to permit the jury to actually hear a Defendant's own incriminating statements convict him, when he has not yet had the opportunity to make an intelligent decision whether to make or not to make any statement.

In **Berger vs. State of New York,** 388 U.S. 41, 87 S.Ct. 1873 (1967), Justice Douglas, in his concurring opinion, stated at page 67:

> "The words that a man says consciously on a radio are public property. But I do not see how government using surreptitious methods can put

a person on the radio and use his words to convict him. Under our regime, a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the 'mere evidence' rule. For the Fourth Amendment and the Fifth come into play when the accused is 'the unwilling source of the evidence' . . . there being no difference 'whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers . . .

" . . . in short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence, is or can be constitutional under the Fourth and Fifth Amendments . . ."

This Court has gone to great extreme to extend Constitutional rights of Defendant outside the courtroom by limiting the use of extrajudicial statements made by such Defendant. In **Miranda vs. State of Arizona,** 384 U. S. 436, 86 S.Ct. 1602 (1966), this Court stated at Page 460:

" . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands

> that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will' . . ."

Further, this Court in **Linkletter vs. Walker,** 381 U. S. 618, 85 S.Ct. 1731, (1965), discussed the retrospective application of new criminal rules, and stated at P. 1743:

> " . . . finally in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the **fairness of the trial** . . ." (Emphasis Added)

And, in **Desist,** this Court stated the exclusionary rule under the Fourth Amendment is but a "procedural weapon that has no bearing on guilt" and "the fairness of the trial is not under attack."

Petitioner submits that if a defendant elects not to testify, the prosecution has the burden of carrying forward the prosecution without the defendant's own voice and words making up the primary evidence for his conviction. It is respectfully submitted that the "fairness of the trial" is clearly under attack if such a procedure is used.

B. Conflict of Decisions

This case was prepared for submission to this Court prior to March 24, 1969, the date of the **Desist** ruling, on a clear conflict of decisions between two Courts of Appeals, on almost identical factual situations, in their interpretation of **Katz vs. United States, supra.**

In **United States vs. White**, 405 F. 2nd 838 (Jan. 7, 1969), the Seventh Circuit, in banc, reversed a conviction wherein identical electronic eavesdropping devices were used by the government, also prior to December 18, 1967. There, a device was placed on an informer, who visited White's place of business, and met with him on several occasions at other places. In addition, a device was placed on a telephone the informer used to call White at his home and place of business. All of White's conversations were overheard by Government agents. The informer was not called as a witness, as was the case here, but the Government agents testified as to the incriminating statements overheard by them through the use of the electronic eavesdropping devices.

The Seventh Circuit's decision, reversing the conviction, distinguished all prior cases relied on by goverment to justify the use of electronic devices. The Court stated that **Lopez vs. United States** 373 U. S. 427, 83 S.Ct. 1381 (1963), merely held that tape recordings of oral conversations could be used only to corroborate the prior testimony of an agent or an informer, and since the informer did not testify, the tape recordings could not be authorized. The Court also stated that **On Lee vs. United States** 343 U.S. 747, 72 S.Ct. 967 (1952) may have been applicable if this Honorable Court had not destroyed the effectiveness of the decision over the past several years and "completely eroded the decisional basis of **On Lee.**"

The Fifth Circuit Court recognized their divergent point of view by stating:

> "We are, of course, aware that our analysis of Katz is in conflict with a Seventh Circuit decision . . . **United States v. White** ____F. 2nd _____ (7th Cir. 1968) . . ."

It is Petitioner's contention that even if this Court had not ruled on the **Katz** and **Desist** cases, and if the only case to come before this Court involved the government's use of electronic eavesdropping devices on telephones, when telephone calls are made to, not from, defendant's home or place of business, this Court, under the existing case law, would still have held that the search and seizure provisions of the Fourth Amendment and the Fifth Amendment were violated by the government agents, would have upheld the Seventh Circuit's decision, and would have reversed the Fifth Circuit.

It is further submitted that Justice Harlan was prophetic when he challenged the majority, in his dissenting opinion in **Desist**, as follows:

> "The unsound character of the rule reaffirmed today is perhaps best exposed by considering the following hypothetical. Imagine that the Second Circuit in the present case had anticipated the line of reasoning this Court subsequently pursued at . . . concluding—as this Court there did—that 'the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling . . . Would we have reversed the case on the ground that the principles the Second Circuit had announced—though identical with those in Katz—should not control because Katz is not retroactive? To the contrary, I venture to say that we would have taken satisfaction that the lower Court had reached the same conclusion we subsequently did in Katz. If a 'new' constitutional

> doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if each of our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature."

What Justice Harlan has prophesized has come true. The Seventh Circuit, in **United States vs. White**, supra, ruling on the identical factual situation as is presented here, and "anticipating the line of reasoning this Court subsequently pursued," decided that "the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling".

Can this Honorable Court now say that the Seventh Circuit was wrong in setting Mr. White free, and the Fifth Circuit is correct in sending Mr. Koran to prison, when both were convicted on the same illegally obtained evidence. This is not "justice to each litigant on the merits of his own case."

CONCLUSION

Petitioner respectfully submits that even without the benefit of **Katz** and **Desist,** and the conflict between the Fifth and Seventh Circuits, the existing case law clearly sets forth that the illegally obtained evidence used to convict Petitioner, was a clear violation of his constitutional rights under both the Fourth and Fifth Amendments.

Respectfully submitted,

H. ROBERT KOLTNOW &
GERALD KOGAN
Attorneys for Petitioner
1201 Biscayne Building
19 West Flagler Street
Miami, Florida

By _____

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 66-395 -Cr-TC

18 USC 474 M/S $5,000 - 15 yrs, or both

UNITED STATES OF AMERICA
v.
MORTIMER NORMAN KORAN

INDICTMENT

The Grand Jury charges:

COUNT ONE

That on or about the **27th day of June, 1966,** at Hallandale, Broward County, in the Southern District of Florida, the defendant,

MORTIMER NORMAN KORAN

did, with intent to defraud the United States, **make a print** of an obligation of the United States, to wit: a $5.00 Federal Reserve Note drawn on the Federal Reserve Bank of New York, Series 1950E, Check Letter "P," Face Plate No. 399, Serial No. B34871063F, bearing facsimile signature of Henry H. Fowler, Secretary of the Treasury, and Kathryn O'Hay Granahan, Treasurer of the United States; in violation of Title 18, United States Code, Section 474.

COUNT TWO

That on or about the **27th day of June 1966,** at Hallandale, Broward County, in the Southern District of Florida, the defendant,

MORTIMER NORMAN KORAN

did, with intent to defraud the United States, **make a print** of an obligation of the United States, to wit: a $1.00 Federal Reserve Note, drawn on the Federal Reserve Bank of St. Louis, Missouri, Series 1963A, Check Letter "C," Face Plate No. 183, Serial No. H-06297830A, bearing facsimile signature of Henry H. Fowler, Secretary of the Treasury, and Kathry O'Hay Granahan, Treasurer of the United States; in violation of Title 18, United States Code, Section 474.

COUNT THREE

That on or about the **28th day of June 1966,** at Hallandale, Broward County, in the Southern District of Florida, the defendant,

MORTIMER NORMAN KORAN

did, **with intent to defraud** the United States, **make a print** of an obligation of the United States, to wit: a $1.00 Silver Certificate, Series 1957, Check Letter "B," Face Plate No. 398, Serial No. P88668 314A, bearing facsimile signature of Robert B. Anderson, Secretary of the Treasury, and Ivy Baker Priest, Treasurer of the United States; in violation of Title 18, United States Code, Section 474.

COUNT FOUR

That on or about the **27th day of June, 1966,** at Hallandale, Broward County, in the Southern District of Florida, the defendant,

MORTIMER NORMAN KORAN

did, knowingly, possess without authority from the Secretary of the Treasury or other proper officer, obligations made in part after the similtude of an obligation

issued under the authority of the United States, to wit: a $5.00 Federal Reserve Note drawn on the Federal Reserve Bank of New York, Series 1950E, Check Letter "P," Face Plate No. 399, Serial No. B34871063F, bearing facsimile signature of Henry H. Fowler, Secretary of the Treasury, and Kathryn O'Hay Granahan, Treasurer of the United States, and a $1.00 Federal Reserve Note, drawn on the Federal Reserve Bank of St. Louis, Missouri, Series 1963A, Check Letter "C," Face Plate No. 183, Serial No. H-06297830A, bearing facsimile signature of Henry H. Fowler, Secretary of the Treasury, and Kathryn O'Hay Granahan, Treasurer of the United States, with the intent to use said obligations to facilitate future sales of counterfeited obligations of the United States; in violation of Title 18, United States Code, Section 474.

COUNT FIVE

That on or about the 28th day of June, 1966, at Hallandale, Broward County, in the Southern District of Florida, the defendant,

MORTIMER NORMAN KORAN

did, knowingly, possess without authority from the Secretary of the Treasury or other proper officer, obligations made in part, after the similtude of an obligation issued under the authority of the United States, to wit: a $1.00 Silver Certificate, Series 1957, Check Letter "B," Face Plate #398, Serial No. P88668 314A, bearing facsimile signature of Robert B. Anderson, Secretary of the Treasury, and Ivy Baker Priest, Treasurer of the United States, with the intent to use said obligation to facilitate future sales of counterfeited obligations of the United States; in violation of Title 18, United States Code, Section 474.

COUNT SIX

That on or about the 3rd day of August 1966, in Hallandale, Broward County, in the Southern District of Florida, the defendant,

MORTIMER NORMAN KORAN

with intent to defraud the United States, did knowingly and unlawfully possess paper similar to that distinctive paper which had previously been adapted to the making of obligations of the United States, to wit:

1500 sheets of 20 lb white husky bond paper 8½" x 11",

1000 sheets of 20 lb Sphinx Park Lane Bond paper, 8½" x 11" (canary),

500 sheets of 20 lb Georgia-Pacific blue bond 8½" x 11",

500 sheets of white bond paper, 8½" x 11",

250 sheets, green bond paper 8½" x 11"

without the authority of the Secretary of the Treasury or some other proper officer of the United States; in violation of Title 18, United States Code, Section 474.

A TRUE BILL
CHARLES E. JENKINS
FOREMAN

WILLIAM A. MEADOWS, JR.
UNITED STATES ATTORNEY
By: Michael J. Osman
Assistant U. S. Attorney

APPENDIX B

(TITLE OMITTED)

NO. 66-395-CR-TC

MOTION TO SUPPRESS

COMES NOW the Defendant, MORTIMER NORMAN KORAN, by and through his undersigned attorney, and files this his Motion to Suppress any and all evidence which the prosecution intends to introduce against the Defendant in the forthcoming trial of the above entitled cause, which evidence was obtained as a result of an illegal arrest and/or unlawful search and seizure contrary to the Constitution of the State of Florida and the Constitution of the United States of America.

WHEREFORE, the Defendant, MORTIMER NORMAN KORAN, prays that this Motion be granted.

GERALD KOGAN

GERALD KOGAN
Attorney for Defendant
1201 Biscayne Building
Miami, Florida 33130
Phone 371-2661

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to WILLIAM A. MEADOWS, U. S. Attorney, P. O. Box 1070, Miami, Florida, this 8th Day of September, 1967.

GERALD KOGAN

Gerald Kogan

APPENDIX C

(TITLE OMITTED)

NO. 66-395-CR-TG

MOTION FOR NEW TRIAL

COMES NOW the Defendant, MORTIMER NORMAN KORAN, by and through his undersigned attorneys, and moves the Court to grant him a new Trial for the following reasons:

1. The Court erred in denying Defendant's Motion For Acquittal made at the conclusion of the Government's case.

2. The Court erred in denying Defendant's Motion For Acquittal made at the conclusion of all evidence.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. The verdict is contrary to the law.

6. The verdict is contrary to both the law and the evidence.

7. The Court erred in denying the Defendant's Motion To Suppress all tape recorded telephone conversations held between the witness, ART RIVERS, and the Defendant, as well as recordings made as the result of non-telephone conversations that took place between the witness, ART RIVERS, and the Defendant, and between the informer and the Defendant.

8. The Defendant was substantially prejudiced and deprived of a fair Trial by reason of the following: The attorney for the Government in his opening statement alluded to other crimes committed by the Defendant, which said crimes were irrelevant to the instant case, and further in permitting testimony by the Government witnesses pertaining to telephone conversations by the Defendant concerning other crimes and the arrest of Defendant on other crimes, irrelevant to the instant case.

9. The Court erred in denying Defendant's Motions For Mis-Trial.

GERALD KOGAN and
H. ROBERT KOLTNOW
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

By /s/ GERALD KOGAN

I HEREBY CE .IFY that a copy of the foregoing Motion for New Trial was mailed to WILLIAM A. MEADOWS, U.S. Attorney, P. O. Box 1070, Miami, Florida, this 20th day of September, 1967.

/s/ GERALD KOGAN

APPENDIX D

(TITLE OMITTED)

NO. 66-395-Cr-TC

ORDER

This cause came on to be heard upon the defendant's Motion for New Trial, [and upon the Court having reserved ruling upon the defendant's Motion for Judgment of Acquittal at the close of all the evidence in this cause.] The Court having heard argument of counsel and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the Motion for New Trial be, and the same is, hereby denied, [and the Motion for Judgment of Acquittal be and the same is, hereby denied.]

DONE AND ORDERED at Miami, Florida, this 24 day of October, 1967.

TED CABOT
United States District Judge

cc: U.S. Attorney (Osman)
Gerald Kogan, Esq.
Atty for defendant
Chief Probation Officer

APPENDIX E

(TITLE OMITTED)

NO. 66-395-CR-TC

On this 27th day of October, 1967 came the attorney for the government and the defendant appeared in person and by Gerald Kogan, Esq., counsel,

It is adjudged that the defendant upon his plea of "not guilty, and a verdict of guilty," has been convicted of the offense of printing and possessing a counterfeit obligation of the United States, with the intent to use said obligation to facilitate sales; in violation of Title 18 USC, Section 474 as charged in Counts Three & Five of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS as to each of Counts Three and Five, or until otherwise discharged by due process of law, said period of confinement to run concurrently with each other.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

TED CABOT
United States District Judge

A True Copy. Certified this 27th day of October, 1967.

JOSEPH I. BOGART
Clerk
MELVIN R. STEIN
Deputy Clerk

APPENDIX F

(TITLE OMITTED)

NOTICE OF APPEAL

NOTICE is hereby given that MORTIMER NORMAN KORAN, Defendant, by his undersigned attorneys, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this proceeding on the 27th day of October, 1967, wherein the and Count Five of the Indictment herein, after a plea of not guilty to each of said Counts and a Jury Trial, with a sentence as follows:

Five Years as to Count Three, and
Five Years as to Count Five, concurrently.

DATED this 27th day of October, 1967.

GERALD KOGAN and
H. ROBERT KOLTNOW
Attorneys for Defendant
1201 Biscayne Building
Miami, Florida 33130

By H. ROBERT KOLTNOW

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was mailed to WILLIAM A. MEADOWS, U.S. Attorney, P.O. Box 1070, Miami, Florida, this 27th day of October, 1967.

H. ROBERT KOLTNOW

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25446

MORTIMER NORMAN KORAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(January 27, 1969)

Before GEWIN and BELL, Circuit Judges, and BOOTLE, District Judge.

GEWIN, Circuit Judge: Mortimer Norman Koran was convicted in the United States District Court for the Southern District of Florida on Counts Three and Five of an indictment charging substantive offenses relating to counterfeit currency.[1] Count Three charged Koran with

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[1]The pertinent parts of the statute, 18 U.S.C. § 474 (1964), provide respectively:

> Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

printing a one dollar silver certificate and Count Five charged him with possession of the certificate. He was sentenced to five years imprisonment on each count, the sentences to run concurrently. We affirm the judgment of conviction.

Appellant Koran urges that his fourth amendment rights were violated by the introduction at his trial of evidence obtained through the use of electronic listening and recording devices. The evidence challenged consisted of (1) the testimony of an investigator, (2) the tape recordings of certain telephone conversations, and (3) the tape recordings of certain non-telephonic conversations. The investigator, Secret Service Agent Rivers, testified that he overheard a conversation between the appellant and a government informer, Schatzabel, in which the appellant discussed plans for printing a large quantity of counterfeit currency. The conversation took place in the appellant's printing establishment while Agent Rivers, stationed a short distance away, listened to the conversation over a radio which received transmissions from a device concealed in Schatzabel's shirt pocket. The tapes of telephone conversations which were received in evidence were recordings of communications between the appellant and Schatzabel and between the appellant and Agent Rivers, who acted incognito as a prospective buyer of counterfeit merchandise. These conversations were re-

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Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States. . . .

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

The jury returned a verdict of "not guilty" on three additional counts.

corded by a device attached to the telephone used by Schatzabel and Rivers, both of whom consented to the recording of the conversations. The non-telephonic tapes were recordings of two conversations between Agent Rivers and appellant Koran which took place beneath a bridge. On both occasions, Rivers was equipped with a transmitter when he met with the appellant. The conversations were recorded by another agent who was posted nearby.

Prior decisions of this court, as well as decisions of the Supreme Court, have approved the use of evidence obtained by the methods employed in this case.[2] The appellant contends, however, that the Supreme Court in **Katz v. United States**[3] charted a new course which demands disapproval of such investigative techniques. He points particularly to the Court's pronouncement in **Katz** that "[w]hat a person knowningly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[4] The appellant asserts that, since he was unaware of the presence of electronic listening and recording devices, he did not **knowingly** expose to the public his private conversation.

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[2]Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952); Harris v. United States, ... F.2d ..... (5th Cir. 1968); Handsforth v. United States, 390 F.2d 373 (5th Cir. 1968); Dryden v. United States, 391 F.2d 214 (5th Cir. 1968); Dancy v. United States, 390 F.2d 370 (5th Cir. 1968); Beatty v. United States, 377 F.2d 181 (5th Cir.), *rev'd on other grounds*, 389 U.S. 347 (1967); Hurst v. United States, 370 F.2d 161 (5th Cir. 1967).

[3]389 U.S. 347 (1967).

[4]389 U.S. at .....; 19 L.Ed2d at 582.

This court has previously concluded that **Katz** leaves undisturbed the established law applicable to the methods of investigation employed in this case.[5] And in a recent opinion, the Tenth Circuit reached the same conclusion,[6] emphasizing the language of Mr. Justice White's concurrence in **Katz**:

> When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetition, is instead recording it or transmitting it to another.[7]

Government agents in **Katz** had attached electronic listening equipment to the top of a telephone booth. When the defendant used the booth in making calls, the agents overheard his end of the conversations. The Supreme Court held that, since the search did not comply with constitutional standards, the evidence of the conversations was not admissible.

The attempt to equate the case **sub judice** with **Katz** must fail. It is true that appellant Koran did not wish to

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[5]Dryden v. United States, 391 F.2d 214, 215 (5th Cir 1968); Dancy v. United States, 390 F.2d 370, 371 (5th Cir. 1968); Long v. United States, 387 F.2d 377, 378 n.1 (5th Cir. 1967). *See* Harris v. United States, ... F.2d ..... (5th Cir. 1968) [No. 24303, August 1, 1968]; Handsforth v. United States, 390 F.2d 373 (5th Cir. 1968).

[6]Holt v. United States, ... F.2d ..... (10th Cir. 1968) [No. 9859, September 16, 1968].

[7]389 U.S. at ..... n.1; 19 L.Ed.2d at 589 n.1.

expose his words to the public. However, this fact alone does not suffice, for no criminal desires public exposure of his surreptitious activity. The crucial fact here is that the appellant knowingly took the risk that his conversants might expose his statements. Therefore, he cannot now complain that his conversants did in fact expose the conversations. In **Katz**, on the other hand, exposure of the defendant's private conversation was unaided by his conversant. Instead, exposure resulted from circumstances unrelated to the risk which the defendant knowingly took when he spoke to his conversant. Thus we think it clear that the appellant's reliance upon **Katz** is misplaced.[8]

The appellant argues that Agent Rivers' testimony relating to the conversation he overheard between the appellant and Schatzabel as they talked in the appellant's shop was nevertheless improper because it was unsupported by testimony from Schatzabel, who did not testify. This contention is without merit. The absence of supporting testimony from Schatzabel would have significance only if there existed a complete lack of evidence identifying the appellant as the party with whom Schatzabel conversed. Although Agent Rivers from his listening post could not visually observe the participants in the conversation, the record establishes beyond dispute that the appellant was one of the parties.

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[8]We are, of course, aware that our analysis of *Katz* is in conflict with a Seventh Circuit decision. In United States v. White, ... F.2d ..... (7th Cir. 1968) [Nos. 16021 & 16022, March 18, 1968], the court held that mere existence of the need to use informers and secret devices to obtain information from a defendant is a clear indication that the defendant seeks to exclude the uninvited ear and, consequently, that this method of investigation violates the defendant's fourth amendment rights. As indicated by our discussion, we do not believe the reach of *Katz* extends so far as the Seventh Circuit suggests.

The statute which the appellant was convicted of violating proscribes the printing of currency and the possession of counterfeit currency "except under authority from the Secretary of the Treasury or other proper officer."[9] The appellant contends that the Government did not prove his lack of authority and, therefore, failed to prove all the elements of the offense charged. While the Government offered no direct proof of the appellant's lack of authority, it did present evidence from which the jury could reasonably infer that he had no authority.[10] Agent Rivers, for example, testified:

> He [the appellant] indicated to me had something to [show] me and I said well, let me look at it. He said, well, I'm not going to show it to you out here in the open.
>
> I says well, let me look at it. So he handed it to me and I opened it up and it was a $1.00 Silver Certificate oversized.
>
> Q Did you have any conversations with him regarding that $1.00 Silver Certificate that he handed you on that occasion?
>
> A Yes. He indicated I should get in the car with him to look at this thing in private, which I did.

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[9]See note 1 *supra.*

[10]Since we conclude that the Government presented sufficient evidence to support a finding that the appellant lacked authority, we do not reach the question raised in the briefs of whether proving lack of authority is a burden carried by the Government or a defense which the defendant must raise.

> He stated that he had this at home and he had made it the night before and said he made it oversized just to show its detail which would prove his being a good printer.

If the jury believed the broad thrust of the testimony of the witnesses — which it obviously did — the inference was compelled that the appellant had no authority to print currency or to possess counterfeit currency.

Appellant Koran next contends that the trial court erred in permitting references during the prosecutor's opening statement and in the evidence throughout the trial to the appellant's unlawful printing of title certificates and driver's licenses as a part of the same venture which produced the counterfeit currency. Generally, evidence of crimes not charged in the indictment is inadmissible. However, we believe that the evidence in question falls within a widely recognized exception to the general rule which permits such evidence if it tends to prove a common scheme, plan or design on the part of the defendant so closely related to the offense charged that it may serve to establish the offense or to establish an intent in the mind of the accused to commit the offense.[11]

The prosecutor, in his opening statement, also made reference to the appellant's **arrest** for counterfeiting title certificates and driver's licenses. In response the appellant moved for a mistrial. The court denied his motion but offered to instruct the jury to disregard the prosecutor's comment; defense counsel, however, preferred not to have the instruction. The appellant contends that a mistrial was mandatory. We think, however, that the court was clearly within the bounds of its discretion in denying the motion.

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[11]Pardo v. United States, 369 F.2d 922, 924, (5th Cir. 1966); Robinson v. United States, 366 F.2d 575, 578 (10th Cir. 1966).

The appellant makes one contention which is relevant only to his conviction on Count Five of the indictment, the possession count. The statute under which he was convicted makes unlawful the possession of a counterfeit obligation which is after the similitude of an obligation of the United States. The appellant argues that the oversized silver certificate which he is convicted of possessing was not "after the similitude" of a United States silver certificate.[12] However, it is unnecessary for us to reach this contention since the sentences under both counts run concurrently and since we have concluded that the conviction under the printing count is free of error.[13]

The judgment is AFFIRMED.

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[12]See note 1 *supra*. The statute makes unlawful the *printing* of anything "in the likeness" of an obligation of the United States, without reference to "similitude." The appellant has not raised the likeness question but, even if he had, it would have been to no avail.

> The legislative purpose is clear that Congress intended, in protecting the currency, to tolerate no manipulation in the making of impressions of government obligations or securities, whether the copies or impressions might be good or bad, and regardless of the purpose for which they might be made. . . . [T]here is no need of proof that such impressions were calculated to deceive.
> Webb v. United States, 216 F.2d 151, 152 (6th Cir. 1954).

[13]Hirabayashi v. United States, 320 U.S. 81, 85 (1943); Mishan v. United States, 345 F.2d 790, 791 (5th Cir. 1965). Whether the "Concurrent sentence" doctrine enunciated in *Hirabayashi* has continiung validity in light of subsequent decisions will be argued before the Supreme Court on March 24, 1969. See Benton v. Maryland, 37 U.S.L.W. 3219 (U.S. Dec. 17, 1968) (No. 201).

APPENDIX H

(TITLE OMITTED)

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 27, 1969

APPENDIX I

(TITLE OMITTED)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(March 28, 1969)

Before GEWIN and BELL, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM: The Petition for Rehearing DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX J

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....,

MORTIMER NORMAN KORAN,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 27, 1969.

S/ HUGO L. BLACK
Associate Justice of the Supreme
Court of the United States

Dated this 24th day of April, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 143

MORTIMER NORMAN KORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

QUESTIONS PRESENTED

Whether the court erred in admitting into evidence (1) testimony concerning a conversation between petitioner and an informant which Secret Service agents overheard by means of an electronic device carried by the informant, (2) testimony of a Secret Service agent concerning conversations between petitioner and the agent and the tape recordings of those conversations, and (3) recordings of telephone conversations made with the consent of one of the parties to the conversation.

356-642—69

STATEMENT

An indictment returned in the United States District Court for the Southern District of Florida charged petitioner with several counterfeiting offenses in violation of 18 U.S.C. 474. Counts 1 and 2 charged that on or about June 27, 1966, petitioner, with intent to defraud, made a print of a $5.00 and $1.00 Federal Reserve Note; count 4 charged that on June 27, 1966, petitioner had possession of such notes. Count 3 charged that on June 28, 1966, petitioner, with intent to defraud, made a print of a $1.00 Silver Certificate, and count 5 charged that petitioner had possession of that note.[1] After a jury trial, petitioner was convicted on counts 3 and 5 and was acquitted on the other three counts. He was sentenced to five years imprisonment on each of the two counts, the sentences to run concurrently.

1. On June 27, 1966, after receiving information from Richard Schatzabel that petitioner was involved in printing counterfeit currency and drivers' licenses, Secret Service agents Arthur Rivers and Kenneth Hansen met Schatzabel at a gasoline station. The agents searched Schatzabel for contraband, outfitted him with a transmitting device, and instructed him to meet petitioner to continue discussions with him about a proposed counterfeiting transaction (Tr. 9–11, 47–49, 154–156).[2] Schatzabel went to petitioner's printing shop, while Rivers and Hansen waited

[1] Count 6 was dismissed prior to trial.

[2] We are lodging a copy of the trial transcript with the Clerk of this Court.

nearby with a radio receiver, over which they heard Schatzabel ask the person in the shop, whom he addressed as "Mort," for the "samples." They heard "Mort" explain to Schatzabel that the "samples" were bad because they had been made in a hurry, and tell him that he was willing to "go ahead" if he was paid $150,000. Schatzabel replied that he would have to discuss payment with "Spiegel and his people in New York" (Tr. 52–53, 158–160). When Schatzabel emerged from the printing shop, he gave Rivers the "samples"—a counterfeit one dollar and a counterfeit five dollar Federal Reserve Note (Tr. 54, 160–161). These two notes were the subject matter of counts one, two and four, the counts on which the jury acquitted petitioner.

On June 28, 1966, Schatzabel telephoned petitioner from the Secret Service office and told him that "Spiegel" and his people wanted to meet petitioner and see some samples, and he arranged to take petitioner to the meeting (Tr. 17–18, 56–57, 161–162, 170–174). With Schatzabel's consent, this conversation was overheard by Rivers and was recorded (Tr. 57, 162). At the meeting that afternoon, Schatzabel introduced agent Rivers to petitioner as "Max Spiegel". When Rivers complained about the poor quality of the notes that petitioner gave to Schatzabel on the previous day, petitioner assured him that the notes did not reflect his true printing ability. They talked about counterfeit money and about printing counterfeit drivers' licenses. After Rivers asked for some indication that petitioner was a competent printer,

petitioner left to get some further samples of his work. An hour later, petitioner returned and gave Rivers an oversized $1.00 Silver Certificate, the subject matter of counts 3 and 5, on which petitioner was convicted (Tr. 58–64, 66–73). During these two meetings, which occurred beneath a bridge, Rivers was equipped with a transmitter, and the conversations were received and recorded by agent Hansen, who was stationed nearby (Tr. 175–198, 198–224).

Subsequently, on June 29 and June 30, in telephone calls to petitioner, which were recorded by agent Hansen, Rivers, posing as "Spiegel," told petitioner that he wanted to proceed with counterfeit drivers' licenses rather than with counterfeit money. On July 1, Rivers, again in a recorded conversation, telephoned petitioner to arrange for a meeting under the bridge (Tr. 76–80, 89–90, 224–232). At this meeting, petitioner delivered 100 Florida drivers' licenses to Rivers, and was arrested (Tr. 91–92, 233–234).

2. Petitioner's trial was held in September 1967. At the outset of the trial, petitioner's counsel stated that he did not expect that Schatzabel would be present to testify (Tr. 34). Counsel made no request for a continuance, and he told the jury in his opening statement to ask themselves "the question as to whether or not the government is going to produce for your consideration the motivator and the leading actor behind this entire plan, one Richard Schatzabel." He concluded with the statement that Schatzabel would not testify and that the government would fail to sustain the allegations of the indictment (Tr. 44–45). Thereafter, as part of the government's case,

Rivers stated that the last time he saw Schatzabel was in August 1966 and that subsequently he had sought unsuccessfully to locate him (Tr. 93–94). Rivers testified as to his conversations with petitioner, and both Rivers and Hansen testified as to the conversation between petitioner and Schatzabel which they overheard by means of the radio receiver. The tape recordings of the conversations among Rivers, petitioner, and Schatzabel beneath the bridge and the tapes of the various telephone conversations were also introduced into evidence.[3]

DISCUSSION

This case involves the admissibility of evidence obtained through the government's use of electronic equipment to overhear and record conversations with the consent of one of the parties thereto—issues similar to those presented in *United States* v. *White,* No. 46, this Term, certiorari granted, 394 U.S. 957. The present case is different from *White,* inasmuch as the consenting party, agent Rivers, testified at trial,[4] and is thus even more clearly controlled by *Lopez* v. *United States,* 373 U.S. 427, and *Kaufer* v. *United States,* 394 U.S. 458. In our brief in opposition in an essentially similar case, *Franke, et al.* v. *United States,* No. 161, this Term, we relied on that difference in suggesting that the petition could be

[3] Petitioner did not testify. In his closing argument to the jury, defense counsel contended that the government should have produced Schatzabel as a witness.

[4] Although the government also introduced evidence relating to the overhearing of the conversation between the petitioner and Schatzabel on June 27, 1966, in the printing shop, petitioner was acquitted on the counts based on this conversation.

acted on without awaiting the decision in *White*. While we continue to think that course is appropriate, we would have no objection, if the Court views this case and *White* as interrelated, to the deferment of disposition of the instant petition, with respect to Koran's Fourth Amendment contention,[5] until after the decision in *White*. Petitioner's alternate argument—prompted by the adverse effect of *Desist* v. *United States*, 394 U.S. 244, and *Kaufer, supra*, on the applicability of *Katz* v. *United States*, 389 U.S. 347—that the admission of the agents' testimony violated his privilege against self-incrimination is without merit, since petitioner's conversations were entirely voluntary. See *Hoffa* v. *United States*, 385 U.S. 293, 303–304.[6]

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WILL WILSON,
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SIDNEY M. GLAZER,
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JULY 1969.

[5] The Seventh Circuit in *White* distinguished *Lopez* on the ground that the government agent in that case testified at trial while the undercover agent in *White* was unavailable at trial. See 405 F. 2d 838, 847. As we argue in our brief on the merits in *White* (pp. 24–26), however, the legality under the Fourth Amendment of consensual eavesdropping should be determined as of the time of the overhearing, and should not be affected by the availability of witnesses at trial.

[6] As for the recorded telephone conversations, the fact that petitioner did not initiate the calls is immaterial so long as one of the parties, as here, consented to the recordation. See *Rathbun* v. *United States*, 355 U.S. 107.

U.S. GOVERNMENT PRINTING OFFICE: 1969